

U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON SCIENCE AND TECHNOLOGY

SUITE 2321 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6301  
(202) 225-6375  
<http://science.house.gov>

July 20, 2010

The Honorable Steven Chu  
Secretary  
Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC 20585

Dear Secretary Chu:

We write to you once again to seek further explanation and documentation regarding the Administration's decision to abandon the development of the Yucca Mountain site as a nuclear waste repository. Despite a nearly \$10 billion investment, clear congressional direction and legal obligation, and robust scientific study and oversight, the Administration continues to take unexplained actions that could ultimately sacrifice the project.

In May 2009 and February 2010 we wrote you to reconcile your statements in support for "restarting" nuclear power with Administration actions that risk materially delaying the expansion of nuclear energy in the United States.<sup>12</sup> On June 1, 2009 and July 7, 2010 you responded with brief letters noting your plan to establish a blue ribbon commission on nuclear waste storage but failing to provide the requested records.<sup>3</sup>

Follow up discussion between Committee staff and Department staff confirmed that you consider the June 1, 2009 letter to be responsive and that the Department does not possess documents related to the decision or our inquiry. If this is indeed true, we find it alarming that your Department made an important decision that could have significant adverse consequences for the nation and the American taxpayer without conducting a comprehensive analysis.

The Nuclear Regulatory Commission's (NRC) recent ruling that the Department of Energy lacked the authority to withdraw its application for Yucca Mountain further reinforces the need for Congress to review the circumstances surrounding this decision.

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<sup>1</sup> Letter from Reps. Ralph Hall, Joe Barton, Paul Broun, and Greg Walden to Secretary Chu, May 7, 2009 (copy attached).

<sup>2</sup> Letter from Reps. Ralph Hall, and Paul Broun to Secretary Chu, February 3, 2010 (copy attached).

<sup>3</sup> Letter from Secretary Chu to Reps. Ralph Hall, Joe Barton, Paul Broun, and Greg Walden, June 1, 2009; and Letter from Secretary Chu to Reps. Ralph Hall and Paul Broun, July 7, 2010 (copy attached).

The Honorable Chu

July 20, 2010

Page two

In their decision, the NRC's Atomic Safety and Licensing Board Administrative Judges stated that:

[U]nder the NWPA [Nuclear Waste Policy Act] ultimately authority to make a siting decision is not committed to the discretion of either the Secretary of Energy or the President, but instead rests with Congress.<sup>4</sup>

Furthermore, they went on to reference Congressional intent by citing the debate surrounding S. 6476 which stated:

A license application will be submitted by the Department of Energy for Yucca Mountain and over the next several years, the Nuclear Regulatory Commission will go through all the **scientific and environmental data** and look at the design of the repository to make sure that it can meet environmental and safety standards; **This will be done by scientists and technical experts.**<sup>5</sup> [emphasis added]

In a speech before the National Academies of Science, the President stated "I want to be sure that facts are driving scientific decisions -- and not the other way around."<sup>6</sup> Similarly, when signing the new Executive Order regarding stem cell research, the President stated:

We base our public policies on the soundest science; that we appoint scientific advisors based on their credentials and experience, not their politics or ideology; and that we are open and honest with the American people about the science behind our decisions.<sup>7</sup>

To date, the Department of Energy has not provided any scientific or technical justification for determining that Yucca Mountain "is not a workable option," arguing that the decision is, in fact, a "matter of policy."<sup>8</sup> We have serious concerns that a decision of this magnitude was made without proper authority and without any semblance of scientific or technical review.

Accordingly, we once again ask that you provide all records responsive to the May 7, 2009, and February 3, 2010 letters. Additionally, we request that you provide the following records, as defined in the attachment, for the period of July 1, 2008 to the present.

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<sup>4</sup> NRC ASLB, Memorandum and Order, Docket No. 63-001 ASLBP No. 09-892-HLW-CAB04 (June 29, 2010)

<sup>5</sup> Ibid.

<sup>6</sup> Remarks by the President at the National Academy of Sciences Annual Meeting, April 27, 2009.

<sup>7</sup> Remarks by President Barack Obama – As Prepared for Delivery, Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum, March 9, 2009.

<sup>8</sup> NRC ASLB, U.S. Dep't of Energy Motion to Withdraw, Docket No. 63-001 ASLBP No. 09-892-HLW-CAB04 (March 3, 2010).

The Honorable Chu

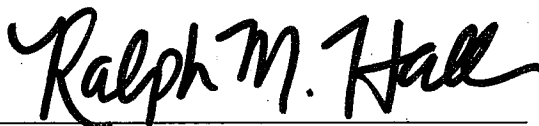
July 20, 2010

Page three

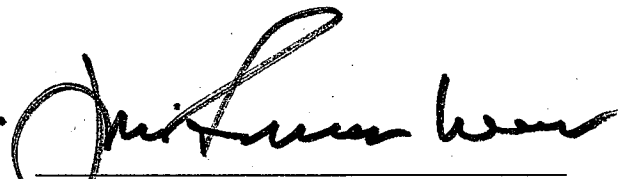
- 1.) All records related to the Department's Motion to Withdraw its pending licensing application with prejudice for a permanent geologic repository at Yucca Mountain, Nevada;
- 2.) All records related to any decision to terminate, reduce, or limit funding for the Yucca Mountain project.
- 3.) All records related to the discontinuation or altering of standard monitoring and data collection at the site.
- 4.) All records related to the Department's policies and procedures relating to preserving and archiving documents related to the Yucca Mountain Repository License Application.

Please deliver two sets of copies to 394 Ford House Office Building. As part of this request was initially made well over a year ago, I would appreciate your response no later than July 30, 2010. If you have any questions or needs additional information, please contact either Mr. Tom Hammond or Mr. Dan Byers with the Science and Technology Committee minority staff at (202) 225-6371, or Mr. Andy Zach with the Select Committee on Energy Independence and Global Warming minority staff at (202) 225-0110.

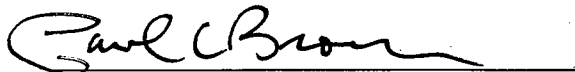
Sincerely,



REP. RALPH HALL  
Ranking Member  
Committee on Science and Technology



REP. F. JAMES SENSENBRENNER  
Ranking Member  
Select Committee on Energy Independence  
and Global Warming



REP. PAUL BROUN, M.D.  
Ranking Member  
Subcommittee on Investigations  
and Oversight  
Committee on Science and Technology

Attachment  
Enclosures

cc: The Honorable Bart Gordon, Chairman  
Committee on Science and Technology

The Honorable Brad Miller, Chairman  
Subcommittee on Investigations and Oversight  
Committee on Science and Technology

The Honorable Edward Markey, Chairman  
Select Committee on Energy Independence  
and Global Warming

## ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.
  
2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

May 7, 2009

The Honorable Steven Chu  
Secretary  
Department of Energy  
1000 Independence Avenue, S.W.  
Washington, D.C. 20585

Dear Secretary Chu:

On April 22, 2009, you testified before the House Committee on Energy and Commerce in connection with its legislative hearings on the American Clean Energy and Security Act of 2009. During your testimony, you stated that the Administration would support a nuclear title in the climate legislation and that the Administration believes that nuclear power has to be “restarted” and must be part of the future energy mix in this country.

Yet you and the Administration are on record as seeking to abandon construction of a deep-underground repository for the nation’s nuclear waste at Yucca Mountain, Nevada. This repository, designated by statute to be located at the Yucca Mountain site and to be the nation’s first permanent nuclear waste repository, is essential for the revitalization and expansion of nuclear power in the United States. And after over 25 years of scientific and technical study and Congressional review, there are no other alternative sites provided for under the law.

According to your press spokesperson, you believe “nuclear waste storage at Yucca Mountain is not an option, period.” At a House Science and Technology Committee hearing in March, you stated that “conditions changed” with regard to Yucca Mountain and that DOE independently is seeking a blue-ribbon panel to take a “fresh look” at nuclear waste and disposal. And your opposition has been reinforced by the Administration’s just released FY 2010 Budget, which states that all Department of Energy (DOE) funding for Yucca Mountain development “has been eliminated,” except to allow DOE to respond to the Nuclear Regulatory Commission’s (NRC) technical questions related to its current review of the DOE Yucca Mountain license application.

Turning away from Yucca Mountain may have significant adverse consequences for the nation and the American taxpayer. For example, the Federal government’s total potential liability from delays in accepting used fuel and nuclear waste could be significantly higher than the past estimates of \$11 billion if Yucca Mountain is no longer an option. The Administration’s position that Yucca Mountain is not an option also raises significant regulatory and legal issues that may not only adversely affect the licensing and development of new nuclear plants, but also

may impact existing operating nuclear plants. The position also raises significant issues for the U.S. Navy and DOE sites, including for the Hanford, Savannah River, Idaho and other DOE sites where spent nuclear fuel and/or high-level radioactive waste is currently being stored pending permanent disposal.

We write to reconcile your testimony in support of "restarting" nuclear power in connection with clean energy policy with the Administration's actions that risk materially delaying the expansion of nuclear energy in this nation. In light of current climate policy debates, it is critical that we understand the Administration's actual plans in this regard. We would appreciate your providing responses to the following:

1. What is the scientific or technical basis, if any, for your decision that the proposed Yucca Mountain repository is "not an option"?
2. How does your decision comport with the Department of Energy's (DOE) statutory obligations under the Nuclear Waste Policy Act of 1982, as amended?
3. Under what legal authority would a blue ribbon panel re-evaluate options for nuclear waste disposal be established?
4. With regard to the proposed blue ribbon panel:
  - a. How would the panel be established?
  - b. What would be the process for appointing persons to serve on the panel?
  - c. What would be the composition of the panel?
  - d. What would be the scope of its review?
5. Prior to your public statements that Yucca Mountain repository is "not an option," was any analysis performed of the potential taxpayer liabilities associated with such a decision?
6. Please provide all documents relating to any legal, technical, or scientific analyses that formed the basis for your decision to re-evaluate nuclear waste disposal alternatives to the proposed Yucca Mountain repository, including, but not limited to, evaluations and recommendations that led you to determine that Yucca Mountain was "not an option."
7. What was the process for making your decision that Yucca Mountain repository is "not an option"? Please describe and identify when and with whom you consulted, including, but not limited to, a description and identification of attendees at any public meetings, any Administration meetings, and any consultations with States affected by the decision.
8. In reaching your determination that the Yucca Mountain repository is no longer an option, did you consult with or receive any briefings from the Nuclear Waste Technical Review Board, DOE laboratory directors or personnel, or any DOE scientists or technical personnel who performed work on the Yucca Mountain project? Please describe when

and with whom you consulted, including, but not limited to, a description and identification of attendees at any meetings.

9. Have you shared your rationale for determining that the Yucca Mountain repository is "not an option" with the Nuclear Waste Technical Review Board or the Nuclear Regulatory Commission?
10. Have you or your staff prepared any analyses of the potential impact that failing to pursue the Yucca Mountain repository may have on the construction of new nuclear plants, which are essential to providing clean and reliable energy in the future? If so, please provide any such analyses.
11. How do you believe the Administration's decision to scale back the Yucca Mountain project will affect DOE's responsibility to develop, construct, and operate repositories for disposal of spent nuclear fuel and high-level radioactive waste under the Nuclear Waste Policy Act of 1982, the Nuclear Waste Policy Amendments Act of 1987, and the Energy Policy Act of 1992?
12. If a repository at Yucca Mountain is not pursued, what does the Administration propose to do with the billions of dollars that have been collected from ratepayers for the Nuclear Waste Fund?

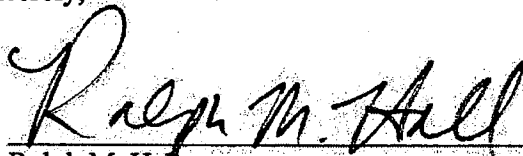
Please provide the written responses and documents requested by no later than two weeks from the date of this letter. We would respectfully request, if the Department withholds any documents or information in response to this letter, that a Vaughan Index or log of the withheld items be attached to the response. The index should list the applicable question number, a description of the withheld item (including date of the item), the nature of the privilege or legal basis for the withholding, and a legal citation for the withholding claim.

Should you have any questions please contact Mr. Peter Spencer of the Minority Energy and Commerce Committee staff at (202) 225-3641, and Ms. Elizabeth Chapel or Mr. Tom Hammond of the Minority Science and Technology Committee staff at (202) 225-6371.

Sincerely,



Joe Barton  
Ranking Member  
Committee on Energy and Commerce

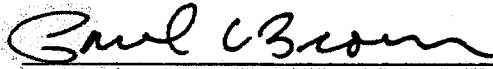


Ralph M. Hall  
Ranking Member  
Committee on Science and Technology





Greg Walden  
Ranking Member  
Subcommittee on Oversight  
and Investigations  
Committee on Energy and Commerce



Paul C. Broun  
Ranking Member  
Subcommittee on Investigations  
and Oversight  
Committee on Science and Technology

Enclosure

cc: The Honorable Henry Waxman, Chairman  
Committee on Energy and Commerce

The Honorable Bart Stupak, Chairman  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce

The Honorable Bart Gordon, Chairman  
Committee on Science and Technology

The Honorable Brad Miller, Chairman  
Subcommittee on Investigations and Oversight  
Committee on Science and Technology



**The Secretary of Energy**  
Washington, D.C. 20585  
June 1, 2009

The Honorable Ralph M. Hall  
Ranking Member  
Committee on Science and Technology  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Hall:

Thank you for your May 7, 2009, letter regarding Yucca Mountain.

As you note in your letter, the Administration is committed to pursuing alternatives to Yucca Mountain. However, we remain committed to meeting our obligations for managing and ultimately disposing of spent nuclear fuel and high-level radioactive waste.

Your letter raises a range of complex questions about Yucca Mountain and the Administration's plans to develop alternatives. I believe that we need to proceed with the development of alternatives in a deliberate and thorough fashion that takes into account these complexities – which include technical, safety, legal, economic and other factors.

To that end, the Administration intends to convene a "blue-ribbon" panel of experts to evaluate alternative approaches for meeting the Federal responsibility to manage and ultimately dispose of spent nuclear fuel and high-level radioactive waste from both commercial and defense activities. This panel will provide the opportunity for a full public dialogue on how best to address this challenging issue and will provide recommendations that may form the basis for working with Congress to revise the statutory framework for managing and disposing of spent nuclear fuel and high-level radioactive waste.

As we begin to restart the nuclear industry in the United States, the time is right to reexamine our options and plans for managing the back end of the fuel cycle. Options for storage, recycling, and geologic disposal of spent nuclear fuel and high-level radioactive waste all deserve careful consideration, with an eye towards development of an updated management framework. The Administration looks forward to ongoing dialogue with members of Congress, interested stakeholders, and others as we review options for alternatives to Yucca Mountain in the months ahead.

If you have any questions, please contact me or Ms. Betty A. Nolan, Senior Advisor, Office of Congressional and Intergovernmental Affairs, at (202) 586-5450.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Chu".

Steven Chu



Printed with soy ink on recycled paper

U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON SCIENCE AND TECHNOLOGY

SUITE 2320 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6301  
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<http://science.house.gov>

February 3, 2010

The Honorable Steven Chu  
Secretary  
Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC 20585

Dear Secretary Chu:

We write to you once again to seek further explanation and documentation regarding the Administration's decision to abandon the development of the Yucca Mountain site as a nuclear waste repository. Despite a nearly \$10 billion investment, clear congressional direction and legal obligation, and robust scientific study and oversight, the Administration continues to take unexplained actions that could ultimately sacrifice the project.

In May 2009, we wrote you to reconcile your statements in support for "restarting" nuclear power with Administration actions that risk materially delaying the expansion of nuclear energy in the United States.<sup>1</sup> On June 1, 2009 you responded with a brief letter noting your plan to establish a blue ribbon commission on nuclear waste storage but failing to address any of the issues or questions that we raised.<sup>2</sup>

Follow up discussion between Committee staff and Department staff confirmed that you consider this letter to be responsive and that the Department does not possess documents related to the decision or our inquiry. If this is indeed true, we find it alarming that your Department made an important decision that could have significant adverse consequences for the nation and the American taxpayer without conducting a comprehensive analysis.

The recent announcement of the Blue Ribbon Commission raises more questions than it answers, as you have declined to comment on the nature of the commission's charter.<sup>3</sup>

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<sup>1</sup> Letter from Reps. Ralph Hall, Joe Barton, Paul Broun, and Greg Walden to Secretary Chu, May 7, 2009 (copy attached).

<sup>2</sup> Letter from Secretary Chu to Reps. Ralph Hall, Joe Barton, Paul Broun, and Greg Walden, June 1, 2009 (copy attached).

<sup>3</sup> Peter Behr, "The Administration puts its own stamp on a possible nuclear revival," ClimateWire, Energy and Environment Publishing, February 2, 2010.

The Honorable Stephen Chu  
Page two  
February 3, 2009

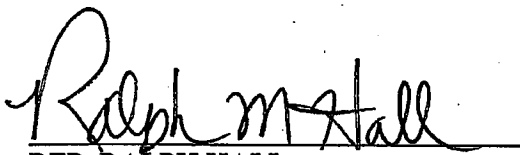
According to the Department's own timeline, the commission won't even issue recommendations until near the end of the Administration's term. This process and timeline highlights the highly illogical nature of terminating the only existing option before assessing potential alternative options, and suggests that political decisions have overridden the need for a systematic and scientific review of all options. Further, the decision to withdraw the Department's Nuclear Regulatory Commission's license application for Yucca Mountain and its concurrent budget proposal to cancel funding for the Office of Civilian Radioactive Waste Management (OCRWM) raises important questions about the legality of these actions with respect to the Nuclear Waste Policy Act (NWPA) of 1982.

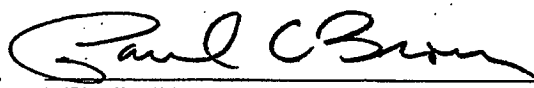
While I was pleased to hear that the Administration chose to increase the Department's contribution to the loan guarantee program, the uncertainty surrounding the Blue Ribbon Commission, combined with the Administration's growing record of mixed signals on other aspects of nuclear energy, raises serious questions about the credibility of the Administration's rhetorical support of this nuclear energy. As Secretary of Energy, you have an opportunity to set the record straight and work with Congress to ensure the resurgence of the only energy source capable of providing significant quantities of affordable, safe, carbon-free electricity.

Accordingly, we ask that you provide all documents responsive to our May 7, 2009 letter, as well as respond to the questions we posed at that time. Additionally, please provide an explanation for, and all documents (see attachment) related to, the establishment of the blue ribbon commission on nuclear waste storage. Last, please explain how the administration proposal to cancel funding for OCRWM is consistent with its statutory obligation to provide for radioactive waste storage under the NWPA. Please provide your response by February 16, 2010.

If you or your staff have any questions or need additional information, please contact either Mr. Tom Hammond or Mr. Dan Byers with the Science and Technology Committee minority staff at (202) 225-6371.

Sincerely,

  
REP. RALPH HALL  
Ranking Member  
Committee on Science and Technology

  
REP. PAUL BROUN, M.D.  
Ranking Member  
Subcommittee on Investigations  
and Oversight  
Committee on Science and Technology

Enclosures

cc: The Honorable Bart Gordon, Chairman  
Committee on Science and Technology

The Honorable Brad Miller, Chairman  
Subcommittee on Investigations and Oversight  
Committee on Science and Technology



The Secretary of Energy  
Washington, DC 20585

July 7, 2010

The Honorable Ralph Hall  
Ranking Member  
Committee on Science and Technology  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Hall:

Thank you for your February 3, 2010, letter regarding the decision to terminate the Yucca Mountain project and to convene the Blue Ribbon Commission. I apologize for the delay in responding.

Expanding our Nation's capacity to generate clean nuclear energy is crucial to our ability to combat climate change, enhance energy security, and increase economic prosperity. The Administration is undertaking substantial steps to expand the safe, secure, and responsible use of nuclear energy.

An important part of a sound, comprehensive, and long-term domestic nuclear energy strategy is a well-considered policy for managing used nuclear fuel and other aspects of the back end of the nuclear fuel cycle. We also remain committed to fulfilling the Government's obligations for spent nuclear fuel and high-level radioactive waste. The funds in the Nuclear Waste Fund will be used to meet that obligation.

However, the Administration believes there are better solutions to our used fuel and nuclear waste disposal needs that can achieve a broader national consensus than Yucca Mountain. Science has advanced considerably since the Yucca Mountain site was chosen 25 years ago. That is why we have convened the Blue Ribbon Commission on America's Nuclear Future (Commission); it will provide advice and make recommendations on alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel and high-level radioactive waste. The Commission plans to issue an interim report within 18 months, and a final report within 24 months of its inception.

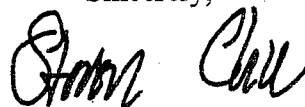
President Obama has directed the Commission to consider a broad range of technological and policy alternatives, and to analyze the scientific, environmental, budgetary, economic, financial, and management issues surrounding each alternative it considers. The Administration looks forward to working closely with Congress and communities around the country that continue to store used nuclear fuel and high-level radioactive waste.



In response to your requests for documents, enclosed is a document that provides the Department's view on the legality of the decisions to discontinue the operation of the Office of Civilian Radioactive Waste Management and to reprogram funds to ensure the orderly closure of the Yucca Mountain Project. Additionally, in response to your request for information regarding the Blue Ribbon Commission, I have included the charter and White House press release regarding the development of the Blue Ribbon Commission.

If you have any questions, please contact me or Ms. Betty A. Nolan, Senior Advisor, Office of Congressional and Intergovernmental Affairs, at (202) 586-5450.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Chu". The signature is written in a cursive, somewhat stylized font.

Steven Chu

Enclosures

cc: The Honorable Bart Gordon  
Chairman, Committee on Science and Technology



# U.S. DEPARTMENT OF ENERGY

**News Media Contact(s):**  
(202) 586-4940

**For Immediate Release**  
January 29, 2010

## **Secretary Chu Announces Blue Ribbon Commission on America's Nuclear Future**

*The Commission, led by Lee Hamilton and Brent Scowcroft, will provide recommendations on managing used fuel and nuclear waste*

Washington, D.C. – As part of the Obama Administration's commitment to restarting America's nuclear industry, U.S. Secretary of Energy Steven Chu today announced the formation of a Blue Ribbon Commission on America's Nuclear Future to provide recommendations for developing a safe, long-term solution to managing the Nation's used nuclear fuel and nuclear waste. The Commission is being co-chaired by former Congressman Lee Hamilton and former National Security Advisor Brent Scowcroft.

In light of the Administration's decision not to proceed with the Yucca Mountain nuclear waste repository, President Obama has directed Secretary Chu to establish the Commission to conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle. The Commission will provide advice and make recommendations on issues including alternatives for the storage, processing, and disposal of civilian and defense spent nuclear fuel and nuclear waste.

"Nuclear energy provides clean, safe, reliable power and has an important role to play as we build a low-carbon future. The Administration is committed to promoting nuclear power in the United States and developing a safe, long-term solution for the management of used nuclear fuel and nuclear waste. The work of the Blue Ribbon Commission will be invaluable to this process. I want to thank Congressman Hamilton and General Scowcroft for leading the Commission and I look forward to receiving their recommendations," said Secretary Chu.

"As the world moves to tackle climate change and diversify our national energy portfolio, nuclear energy will play a vital role," said Carol Browner, Assistant to the President for Energy and Climate Change. "Today, the Obama Administration has taken an important step. With the creation of the Blue Ribbon Commission, we are bringing together leading experts from around the country to ensure a safe and sustainable nuclear energy future."

"Finding an acceptable long-term solution to our used nuclear fuel and nuclear waste storage needs is vital to the economic, environmental and security interests of the United States," said Congressman Hamilton. "This will be a thorough, comprehensive review based on the best available science. I'm looking forward to working with the many distinguished experts on this panel to achieve a consensus on the best path forward."

"As the United States responds to climate change and moves forward with a long overdue expansion of nuclear energy, we also need to work together to find a responsible, long-term strategy to deal with the leftover fuel and nuclear waste," said General Scowcroft. "I'm pleased to be part of that effort along with Congressman Hamilton and such an impressive group of scientific and industry experts."





## Department of Energy

Washington, DC 20585

### Blue Ribbon Commission on America's Nuclear Future U.S. Department of Energy

#### Advisory Committee Charter

1. **Committee's Official Designation.** Blue Ribbon Commission on America's Nuclear Future (the Commission).
2. **Authority.** The Commission is being established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2, and as directed by the President's Memorandum for the Secretary of Energy dated January 20, 2010: Blue Ribbon Commission on America's Nuclear Future. This charter establishes the Commission under the authority of the U.S. Department of Energy (DOE).
3. **Objectives and Scope of Activities.** The Secretary of Energy, acting at the direction of the President, is establishing the Commission to conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel, high-level waste, and materials derived from nuclear activities. Specifically, the Commission will provide advice, evaluate alternatives, and make recommendations for a new plan to address these issues, including:
  - a) Evaluation of existing fuel cycle technologies and R&D programs. Criteria for evaluation should include cost, safety, resource utilization and sustainability, and the promotion of nuclear nonproliferation and counter-terrorism goals.
  - b) Options for safe storage of used nuclear fuel while final disposition pathways are selected and deployed;
  - c) Options for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal;
  - d) Options to make legal and commercial arrangements for the management of used nuclear fuel and nuclear waste in a manner that takes the current and potential full fuel cycles into account;
  - e) Options for decision-making processes for management and disposal that are flexible, adaptive, and responsive;
  - f) Options to ensure that decisions on management of used nuclear fuel and nuclear waste are open and transparent, with broad participation;



(DFO). The DFO will approve or call all of the Commission and subcommittee meetings, approve all meeting agendas, attend all Commission and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest. Subcommittee directors who are full-time Department of Energy employees, as appointed by the DFO, may serve as DFOs for subcommittee meetings.

9. **Estimated Number and Frequency of Meetings.** The Commission is expected to meet as frequently as needed and approved by the DFO, but not less than twice a year.

The Commission will hold open meetings unless the Secretary of Energy, or his designee, determines that a meeting or a portion of a meeting may be closed to the public as permitted by law. Interested persons may attend meetings of, and file comments with, the Commission, and, within time constraints and Commission procedures, may appear before the Commission.

Members of the Commission serve without compensation. However, each appointed non-Federal member may be reimbursed for per diem and travel expenses incurred while attending Commission meetings in accordance with the Federal Travel Regulations.

10. **Duration and Termination.** The Commission is subject to biennial review and will terminate 24 months from the date of the Presidential memorandum discussed above, unless, prior to that time, the charter is renewed in accordance with Section 14 of the FACA.

11. **Membership and Designation.** Commission members shall be experts in their respective fields and appointed as special Government employees based on their knowledge and expertise of the topics expected to be addressed by the Commission, or representatives of entities including, among others, research facilities, academic and policy-centered institutions, industry, labor organizations, environmental organizations, and others, should the Commission's task require such representation. Members shall be appointed by the Secretary of Energy. The approximate number of Commission members will be 15 persons. The Chair or Co-Chairs shall be appointed by the Secretary of Energy.

12. **Subcommittees.**

- a) To facilitate functioning of the Commission, both standing and ad hoc subcommittees may be formed.
- b) The objectives of the subcommittees are to undertake fact-finding and analysis on specific topics and to provide appropriate information and recommendations to the Commission.



## Department of Energy

Washington, DC 20585

April 12, 2010

The Honorable Rodney P. Frelinghuysen  
Ranking Member  
Subcommittee on Energy and Water Development  
Committee on Appropriations  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Frelinghuysen:

To ensure that the Department of Energy fully addresses the legal concerns you raised during the March 24<sup>th</sup> hearing of the Subcommittee on Energy and Water Development, Secretary Chu has asked me to provide you with our views on the legality of the recent decisions to discontinue operation of the Office of Civilian Radioactive Waste Management ("OCRWM") and reprogram funds to ensure the orderly closure of the Yucca Mountain Project. We are sensitive to the issues you raised and appreciate the opportunity to set forth our analysis.

### I. The Discontinuation and Consolidation of OCRWM

At the March 24<sup>th</sup> hearing, you expressed concern that the Department might not have statutory authority to discontinue operation of OCRWM. You also were concerned that the proposed discontinuation might violate both Section 302 of the 2010 Energy and Water Development and Related Agencies Appropriations Act ("FY2010 EWD")<sup>1</sup> and § 4604 of the Atomic Energy Defense Act.<sup>2</sup>

#### A. The Department Has Authority to Discontinue Operation of OCRWM.

We agree completely with your observation at the hearing that the Department "ha[s] to have some statutory authority" in order to discontinue operation of OCRWM. We believe that the Department of Energy Organization Act provides that authority since it grants the Secretary of Energy broad discretion "to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary and appropriate." See 42 U.S.C. § 7253(a). The Secretary's discretion does "not extend to the abolition of organizational units or components established by" the Organization Act.<sup>3</sup> But, as you noted, OCRWM was not established by the Organization Act. Rather, it was established by the Nuclear

<sup>1</sup> Pub. L. No. 111-85 (2009).

<sup>2</sup> 50 U.S.C. § 2704; formerly § 3161 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484 (1992).

<sup>3</sup> *Id.* (emphasis added).

Waste Policy Act of 1982 ("NWPA").<sup>4</sup> Accordingly, the Secretary has the authority to "alter, consolidate or discontinue" OCRWM as he deems "necessary and appropriate."

B. The Proposed Discontinuation Does Not Violate Section 302.

You also expressed concern that Section 302 of the FY2010 EWD might prohibit the Department from discontinuing OCRWM operations. Section 302(3) provides that "[n]one of the funds appropriated by this Act may be used. . . [to] develop or implement a workforce restructuring plan that covers employees of the Department of Energy."

The text of Section 302(3) dates back to the 1998 Energy and Water Development Appropriations Act ("FY1998 EWD"),<sup>5</sup> which prohibited the use of appropriated funds to "develop or implement a workforce restructuring plan that covers employees of the Department of Energy . . . under section 3161 of the National Defense Authorization Act for Fiscal Year 1993." FY1998 EWD, § 303. Both the text and the legislative history of the FY1998 EWD make clear that the "workforce restructuring plan" provision was intended only to prohibit the Department of Energy from extending to *federal employees* benefits provided by § 3161 of the National Defense Authorization Act for Fiscal Year 1993, to *contractors* affected by the post-cold war downsizing of the Department's defense production complex. See H.R. Rep. No. 105-190, at 126 (1997) ("The Committee has been informed by the Secretary of Energy that the Department plans to extend the provisions of section 3161 to Federal employees at Department of Energy sites. This would provide to Department of Energy employees additional benefits which are not available to any other Federal employees. This was never the intent of this legislation. Federal employees are covered by a multitude of laws which control employee benefits and protections during the downsizing of Federal agencies."). This narrow prohibition has been retained in successive Energy and Water Development Appropriations Acts since FY1998 – including the FY2010 EWD.

The 2009 Omnibus Appropriations Act<sup>6</sup> re-numbered the statutory provisions and consolidated the "workforce restructuring plan" provision in its current form. This reorganization, however, did not change the meaning of that long-standing provision. To the contrary, the phrase "workforce restructuring plan" as carried forward to the FY2010 EWD is a term of art that cannot properly be understood outside its original linkage to § 3161. Indeed, the House Report accompanying the 2009 Omnibus Appropriations Act states that the Act "prohibits the use of funds for workforce restructuring. . . under section 3161 of Public Law 102-484."<sup>7</sup> Likewise, the House Report on the FY2010 EWD states (under the title "Section 3161 Assistance") that "[s]ection 302 prohibits the use of funds for workforce restructuring. . . under section 4604 of the Atomic Energy Defense Act."<sup>8</sup>

<sup>4</sup> Specifically, OCRWM was established by § 304 of the NWPA. See 42 U.S.C. § 10224. Nothing in the NWPA mandates that OCRWM must operate in perpetuity or indicates that the Secretary's authority under the Organization Act was repealed.

<sup>5</sup> Pub. L. No. 105-62 (1997).

<sup>6</sup> Pub. L. No. 111-8 (2009).

<sup>7</sup> H. R. Rep. No. 110-921, at 171 (2008) (emphasis added).

<sup>8</sup> H.R. Rep. No. 111-203, at 195 (2009) (emphasis added).

It is therefore clear that the phrase "workforce restructuring plan" as employed in Section 303 of the FY1998 EWD and carried forward to Section 302 of the FY2010 EWD is a term of art effectively prohibiting the Department from extending to its terminated employees (as opposed to contractors) § 3161 benefits. Were it otherwise, this provision would prohibit the Department from undertaking any reorganization – no matter how minor – that led to the termination of any identifiable group of employees. It is simply not credible that, for the past dozen years, the Department has been prohibited from eliminating any office or terminating any single group of employees. Simply put, Section 302 was drafted to preserve a long-standing, but specific, limitation of Departmental authority that is not applicable here.

Fundamental principles of statutory construction also buttress this understanding of Section 302. Were Section 302 read to prohibit the elimination of any office it would, implicitly, repeal the Secretary's clear authority under the Organization Act to "discontinue . . . organizational units." But "[i]t is . . . a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). As the Supreme Court said, ". . . this 'cardinal rule' means that in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* Here, of course, the statutes are entirely reconcilable. Moreover, the Supreme Court has noted that "the policy [against repeal by implication] applies with even greater force when the claimed repeal rests solely on an Appropriations Act." *Id.*

### C. The Proposed Discontinuation Does Not Violate Section 3161.

At the hearing, you noted these "original links" between Section 302 and Section 3161, and asked whether the discontinuation of OCRWM may "actually violat[e] section 3161." We agree that §§ 302 and 3161 are inextricably linked. But we are confident that nothing in Section 3161 prohibits the proposed discontinuation of OCRWM operations.

Section 3161, now codified at 50 U.S.C. § 2704, is titled "Department of Energy defense nuclear facilities workforce restructuring plan"<sup>9</sup> and provides that "[u]pon determination that a change in the workforce at a defense nuclear facility is necessary, the Secretary of Energy shall develop a plan for restructuring the workforce of [that] facility" according to certain prescribed criteria. In particular, the statute provides that, "[i]n preparing the plan . . . the Secretary shall be guided by [certain] objectives," including "to minimize social and economic impacts;" to provide "preference in [future] hiring" to "[e]mployees whose employment . . . is terminated;" and to provide these employees with "relocation assistance" and "retraining, education, and reemployment assistance."<sup>10</sup>

Thus, Section 3161 prescribes certain benefits for "[e]mployees whose employment in positions at [Department of Energy defense nuclear] facilities is terminated." *Id.* at § 2704(c)(2). Regardless whether the Yucca Mountain facility is a "Department of Energy defense nuclear facility" under 50 U.S.C. § 2704(g), Section 2704 prohibits neither the employees' termination nor the reorganization that necessitates it. To the contrary, the statute functions as a guide for

<sup>9</sup> Emphasis added.

<sup>10</sup> See 50 U.S.C. § 2704(c).

reorganization, recognizing "that a change in the workforce at a defense nuclear facility" will at times be "necessary." *Id.* at § 2704(a).<sup>11</sup>

## II. The Reprogramming of Appropriated Funds

At the hearing, you also expressed concern about the Department's plan to reprogram approximately \$115,000,000 of prior appropriations balances for use in the orderly closure of the Yucca Mountain Project. As the Secretary reaffirmed at the hearing, the Department is committed to keeping the Subcommittee apprised of reprogramming actions and, in this case, it provided written notice of its intent to reprogram in a February 17, 2010 letter to Chairman Visclosky. The Secretary has also indicated his intent to confer with you further about this reprogramming decision.

As a legal matter, though, the Department has the right to reprogram funds. The Supreme Court has stated that the authority to reprogram funds is implicit in a lump sum appropriation. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). As the Court said, "... the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."

As noted in its February 17<sup>th</sup> letter, the Department is exercising this authority to reprogram a total of approximately \$115,000,000 for use within the Repository Program control point and the Program Direction control point for Yucca Mountain Project and program office termination activities within the Nuclear Waste Disposal and Defense Nuclear Waste Disposal appropriations. Thus, the funds reprogrammed will be used consistently with the broad purpose for which they were appropriated. *See* FY2010 EWD.<sup>12</sup>

The Department is mindful that the conference report accompanying the FY2010 EWD included a section titled "Reprogramming Requirements." *See* H.R. Conf. Rep. No. 111-278, at 102 (2009). That section requests that the Department submit a "reprogramming . . . to the House and Senate Committees on Appropriations for consideration before any implementation of a reorganization proposal which includes moving previous appropriations between appropriation accounts." It further requests that the Department "inform the Committees promptly and fully when a change in program execution and funding is required during the fiscal year."

We believe the Department acted in accordance with the spirit of this provision through its February 17<sup>th</sup> letter. It certainly intended to do so. We regret any lapses that may have occurred in communication between the Department and your Committee, and assure you of the Department's intent to keep the lines of communication open going forward.

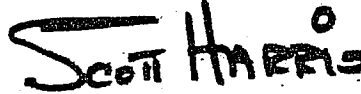
<sup>11</sup> Here, the statute tracks § 643 of the Organization Act, which, as noted, authorizes the Secretary "to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary and appropriate." 42 U.S.C. § 7253(a).

<sup>12</sup> The Department has consistently affirmed that it fully intends to meet its obligations to take possession and dispose of the nation's spent nuclear fuel and high level radioactive waste.

As the Secretary affirmed in his March 26, 2010 letter to Chairman Visclosky, the Department takes very seriously the responsibilities and prerogatives of the Appropriations Committee and the obligations of the Department under the law. We are confident that our actions with respect to the discontinuation of OCRWM operations and the reprogramming of appropriated funds are entirely legal. Nevertheless, we are available to discuss any further concerns you or your staff may have and I am personally available to discuss legal concerns at any time.

The Department looks forward to working with your office toward the development of safe, secure, and workable plans for the long term storage of America's spent nuclear fuel and high level radioactive waste materials.

Sincerely,

A handwritten signature in black ink that reads "Scott Harris". The signature is stylized, with a large, sweeping "S" and a distinct "H".

Scott Blake Harris  
General Counsel

cc: The Honorable Peter Visclosky, Chairman  
The Honorable Ed Pastor, Vice Chairman